IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2023 Session

STATE OF TENNESSEE v. DEMARCUS TAIWAN RUSSELL, JR.

Appeal from the Criminal Court for Green County
No. CC21CR82 Alex E. Pearson, Judge

No. E2022-01428-CCA-R3-CD

TOM GREENHOLTZ, J., concurring in part and dissenting in part.

I have the privilege to join the majority's well-reasoned opinion in significant part. The majority concludes that the evidence is sufficient to uphold the Defendant's conviction for DUI. I agree. The standard of review controls the analysis, and it requires us to view the evidence in the light most favorable to the State to discard all countervailing evidence. *State v. Weems*, 619 S.W.3d 208, 221 (Tenn. 2021). Using this standard, I agree that a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

The majority also concludes that the "prosecutor should not have appealed to the emotions of the jurors by arguing that they or their loved ones might become victims of the impaired driving." I again agree. The State's argument was a clearly improper "golden-rule" or "safer-streets" argument. It appealed to the emotion and passion of the jury by asking its members to envision being a driver with children on the same road as the Defendant. *See, e.g.*, *State v. Gwinn*, No. E2016-01228-CCA-R3-CD, 2017 WL 1505615, at *6 (Tenn. Crim. App. Apr. 26, 2017) (finding improper argument when a prosecutor suggested to the jury that they imagine themselves in driving on a road while the defendant, accused of DUI, was also driving), *perm. app. denied* (Tenn. Aug. 16, 2017).

I part ways with the majority only on one issue: I respectfully disagree with the State that the improper argument likely did not impact the verdict. The State correctly notes that our evaluation of the closing argument should be guided by the five factors identified in *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976). *See also State v. Banks*, 271 S.W.3d 90, 131 (Tenn. 2008). Three of those factors—the second, third, and fifth—are especially weighty in my mind, and when considered in the context of the case, I believe that they weigh in favor of a new trial.

A. THE CURATIVE MEASURES UNDERTAKEN BY THE TRIAL COURT AND THE PROSECUTION

The second *Judge* factor looks to "[t]he curative measures undertaken by the court and the prosecution." *Judge*, 539 S.W.2d at 344. In some cases, an effective curative measure could consist of an admonishment to the prosecutor, and, of course, the prosecutor could personally retract the improper argument. *Id.* at 345-46. In other cases, a curative measure could include a proper limiting instruction, though "an improper statement by the prosecutor made during argument may constitute reversible error despite curative instructions by the trial court." *Id.* at 345.

I respectfully disagree with the State that the curative measures here effectively mitigated the risk of harm caused by the golden-rule argument. In the closing argument, the prosecutor twice ventured into this prohibited area, but he did not retract the statements even after two objections and an in-chambers conference. Instead, the prosecutor returned to the theme for a third time in the rebuttal close. It does not appear in the record whether the trial court admonished the prosecutor, perhaps during the in-chambers conference.

As a possible curative measure, the State notes that the trial court gave a limiting instruction to the jury after the State's closing argument. This instruction correctly reminded the jury to decide the case based solely on the evidence presented and the law given by the court. In my view, though, the actual harm posed by the prosecutor's argument was not that the jury would consider the argument as evidence. It was that the prosecutor encouraged the jury *to evaluate* the trial evidence, specifically the field sobriety tests, through the emotional lens of their children being on the same road as the Defendant.

To counter this risk of harm, the parties could have considered a contemporaneous jury instruction that identified the issue and declared that (1) the jury must evaluate the evidence with absolute fairness and impartiality; and (2) the jury must not let sympathy or prejudice or anything but the law and the evidence to have any influence upon its verdict. True, the trial court gave a version of this instruction in the final charge. However, because it was not contemporaneous with the improper argument, the final instruction lacked the context necessary for the jury to understand the issue and why it could not consider the particular argument being urged by the prosecutor repeatedly.

Instead, the absence of this limiting instruction left the jury with the impression that the prosecutor's method of evaluating the close question of the field sobriety tests was proper. By themselves, the instructional issues likely would not favor a new trial. But because the curative measures failed to mitigate the harm caused by the State's repeatedly

improper argument, I respectfully disagree with the State that this factor favors a finding harmless error.[1]

B. THE INTENT OF THE PROSECUTOR IN MAKING THE IMPROPER ARGUMENT

The third *Judge* factor looks to "[t]he intent of the prosecutor in making the improper statement." *Judge*, 539 S.W.2d at 344. Although the State posits that the prosecutor did not intentionally appeal to the jury's emotions, that conclusion is not obvious to me.

For example, to support its position that the Defendant was actually impaired, the prosecutor directed the jury's attention to the Defendant's performance on field sobriety tests. The prosecutor then carefully noted to the jury how close the Defendant could have been to someone else on the highway, such as one of them or perhaps their child or grandchild. Even after the Defendant objected to the improper argument, the prosecutor immediately resumed the theme:

> That's why we've got to draw the line close. We do that so that five miles down the road that line in the middle of the road is not the only thing between you and someone driving high. What we cannot do, we cannot wait until it's obvious beyond all doubt. We do that we're here on a different trial. You can't wait 'til he hurts himself or somebody else.

On rebuttal argument, the prosecutor returned to the theme a third time:

> A speeding car. You decide whether you would want a member of this community to meet him when he's doing what he was doing. What he was doing what he admitted to doing, was doing.

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[1] A defendant's failure to request a limiting instruction, or to object to the one given, can sometimes weigh against a finding of prejudice in a *Judge* analysis. *See, e.g.*, *State v. Buchanan*, No. M2018-00190-CCA-R3-CD, 2018 WL 6012538, at *5 (Tenn. Crim. App. Nov. 15, 2018), *perm. app. denied* (Tenn. Mar. 27, 2019). This is not one of those cases, though. Here, the Defendant's counsel twice objected to the State's improper argument, and he specifically noted the improper golden-rule aspect of the argument in his second objection. The Defendant's first objection was immediately overruled without comment, and the Defendant's second objection was overruled after an in-chambers discussion. In my view, although we do not know what occurred during the in-chambers discussion, the law did not require the Defendant to take any additional actions beyond his multiple objections to mitigate the prejudice flowing from the improper argument.

Particularly in the absence of overwhelming proof, it is difficult to read the prosecutor's improper argument as anything but an attempt to obtain a verdict, in part, by evoking an emotional response from the jury as it considered the field sobriety tests on the close question of impairment.

As *Judge* itself emphasized, however, "arguably the prejudicial effect to the defendant is the same regardless of the prosecutor's good or bad intent." *Judge*, 539 S.W.2d at 346. As such, I respectfully disagree that this factor favors a finding harmless error.

C. THE RELATIVE STRENGTHS AND WEAKNESSES OF THE CASE

The fifth *Judge* factor looks to the "[t]he relative strength or weakness of the case." *Judge*, 539 S.W.2d at 344. As the *Judge* Court emphasized, the prejudicial impact in a "close case" is "likely to have been greater than it would have been had evidence of defendant's guilt been overwhelming." *Judge*, 539 S.W.2d at 346.

In this case, the evidence is legally sufficient to support the conviction for driving under the influence of an intoxicant. This is largely because we must discard all countervailing evidence when making that assessment. *Weems*, 619 S.W.3d at 221. A different picture emerges, however, when one considers the countervailing evidence to determine prejudice.

Importantly, the statute prohibiting driving under the influence focuses on whether drivers are *impaired* in their ability to operate a motor vehicle. Tenn. Code Ann. § 55-10-401(a). In this case, the Defendant admitted to smoking marijuana roughly five minutes before Trooper Shelton pulled him over. But there were few additional facts to support that his marijuana use caused actual *impairment*.

For example, with respect to the Defendant's driving, Trooper Shelton agreed that he did not observe any driving issue other than speeding. The trooper did not witness the Defendant weaving, swerving, or crossing over lines. He did not see the Defendant speeding up, slowing down, braking unusually, or stopping short. He also did not observe any issues with the Defendant's use of turn signals, driving without headlights, or having other "vigilance problems."

Trooper Shelton further admitted that he identified no clues of impairment before administering the field sobriety tests. For example, the trooper did not observe problems with the Defendant's motor skills. He did not see the Defendant having difficulty getting

out of the car or fumbling with his license. He witnessed no swaying, being unsteady, or having balancing problems. Trooper Shelton confirmed that the Defendant did not have slurred speech and that he did not give incorrect information.

With respect to the field sobriety tests, Trooper Shelton testified that the Defendant's performance on the tests demonstrated "clues" of impairment. However, even after administering the full battery of tests, the trooper believed that the level of impairment was "slight." Indeed, reflecting on the field sobriety tests in the closing argument, even the prosecutor stated that "[f]rankly, honestly, I see people do a whole lot worse on these tests. A whole lot worse than what Mr. Russell did."

Finally, the State presented testimony from TBI Agent Michael Tiller about the level of Delta 9 THC present in the Defendant's blood. Agent Tiller testified that while this level "could impair someone," he could not testify whether the Defendant was *actually* impaired at the time. Instead, he confirmed that levels of THC in a person's blood do not correlate to impairment in the same way that levels of alcohol would.

Whatever else may be said, the proof of *impairment*, while legally sufficient for conviction, is not overwhelming, strong, or particularly compelling. I respectfully disagree with the State that this factor favors a finding harmless error.

CONCLUSION

I agree with the majority's well-written opinion that the evidence is legally sufficient to sustain the Defendant's convictions. I also agree with the majority that the State's closing argument was clearly improper. Finally, I agree that "[a] criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Banks*, 271 S.W.3d at 131.

However, the prejudicial effect of the prosecutor's clearly improper argument could have been overcome only with proper curative measures and sufficiently compelling evidence of impairment. Because neither is present here, I would remand the case to the trial court for a new trial. On this issue alone, I respectfully dissent.

TOM GREENHOLTZ, JUDGE